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IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 44056-2016

CHELSEA REED, n/k/a CHELSEA SORENSEN;
Plaintiff/Respondent

v.

ZANE REED;
Defendant/Appellant

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APPELLANT REPLY BRIEF

Appeal from the Magistrate Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bingham.
Honorable James H. Barrett, Magistrate Judge, presiding.

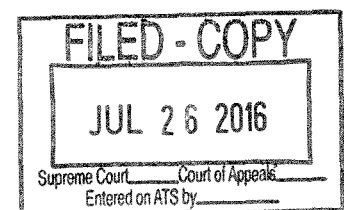
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I. ARGUMENT

As noted throughout Zane's initial appellant brief, which Zane incorporates by reference as if set forth fully herein, the magistrate court findings were not based on the competent, substantial expert witness testimony offered at trial. Instead, the magistrate court issued findings that failed to address material issues affecting the judgment, which was an abuse of the magistrate court's discretion. The magistrate court further abused its discretion in permitting Chelsea's expert witness, Ms. Savage, to testify via Skype in contravention of the family law procedural rules.

The magistrate court also abused its discretion in finding that it was in the best interests of the children to relocate to Havre, Montana with Chelsea. Chelsea failed to meet her burden as the relocating parent under Idaho law to show it was in the children's best interests to relocate to Havre and move back to Blackfoot in 2-3 years' time.

A. The magistrate court's findings were not based on the competent expert witness testimony offered at trial and did not address material issues affecting the judgment.

As argued extensively by Zane in his initial brief, the magistrate court abused its discretion in failing to consider the substantive legal testimony offered by competent expert witnesses at trial. Despite the hours of competent legal testimony offered during the two-day trial, the magistrate court made no reference to the expert witness recommendations regarding child custody. Without any such reference to the extensive expert witness testimony offered at trial, the parties are left to only guess at what the magistrate court utilized in issuing its decision, as acknowledged by Chelsea in her respondent brief: "The conclusion from the magistrate court

not putting specific information from the experts in its findings *could* be that the magistrate court didn't find the experts helpful or compelling when weighing the best interests of the children.” (Respondent Br. 23 (emphasis added).) The magistrate court's findings lacked any basis in the substantial and competent expert witness testimony offered at trial, and the magistrate court abused its discretion in failing to evaluate or even address the testimony.

As further noted in Zane's initial briefing, not only did the magistrate court fail to acknowledge the expert witness testimony offered at trial, including the recommendations by both Ms. Griggs and Mr. Garner that the children remain in Blackfoot, the magistrate court also failed to address fundamental issues at play in determining custody of the children, including the detrimental effects the children would experience in traveling from Havre to Blackfoot for visitation with Zane and the impact on the children from Chelsea's planned return to Blackfoot. As noted below, *infra*, Zane's expert witnesses provided extensive, competent, and unbiased testimony, including their shared belief as to the detrimental impact to the children from both the travel between Havre and Blackfoot and Chelsea's planned move back to Blackfoot. The substantial and competent testimony from Zane's expert witnesses called for a custody arrangement that would have the children remain in Blackfoot, and the magistrate court's findings were not sufficiently supported by the evidence at trial. The magistrate court abused its discretion in failing to evaluate or acknowledge Zane's expert witness testimony in its decision.

1. Zane's experts gave competent, unbiased testimony.

Ms. Griggs and Mr. Garner, Zane's retained expert witnesses, each gave extensive testimony regarding custody of the children as it related to the best interests of the children.

Contrary to Chelsea's arguments, both Ms. Griggs and Mr. Garner provided competent, unbiased testimony regarding the children's best interests.

Ms. Griggs testified regarding her extensive work in the area of Idaho child custody cases, including her experience as an expert witness, her work with Ann Just, and her trainings for judges in Pocatello regarding the best interest standard in child custody cases. (Tr Vol. I, p. 59, L. 20 – p. 61, L. 13.) This was in contrast to Ms. Savage, Chelsea's expert witness, who acknowledged her unfamiliarity with Idaho custodial standards, including the presumption that it is in a child's best interest to maintain frequent and continuing contact with both parents, except in cases involving domestic violence. (*Id.* at p. 188, L.25 – p. 189, L. 5; *id.* at p. 194, L. 1-6.)

Ms. Griggs also testified regarding the detrimental impact on the children if they were to remain in Havre, including the toll of traveling to Blackfoot for visitation with Zane. Ms. Griggs further testified about the losses in relationships and continuity the children would suffer if they moved to Havre. (Tr Vol. I, p. 71, L. 25 – p. 72, L. 15.) Ms. Griggs likewise testified as to the negative effects the children would suffer upon moving back to Blackfoot in 2-3 years. (*Id.* at p. 70, L. 4-24.) Ultimately, Ms. Griggs spoke at length regarding her recommendation for custody of the children: that the children remain in Blackfoot, where they would be able to maintain relationships and continuity. (*Id.* at p. 71, L. 25 – p. 72, L. 15.) Given Ms. Griggs' familiarity with child custody and development theories, as well as Idaho custodial standards, Ms. Griggs provided competent and impartial testimony on issues fundamental to the magistrate court's determination of custody.

Mr. Garner likewise provided extensive testimony regarding the children's best interests,

based on his interactions with the children in Blackfoot. Unlike Ms. Savage, who based her testimony on her observations of the children in Havre, *infra*, Mr. Garner testified regarding his observations of the children in their Blackfoot environment. (*Id.* at p. 95, L. 13 – p. 98, L. 13.) Like Ms. Griggs, Mr. Garner also testified as to the detrimental impact traveling from Havre to Blackfoot would have on the children, as well as the negative effects on the children inherent in Chelsea’s planned move back to Blackfoot.

After discussing his observations of the children in their Blackfoot environment, Mr. Garner gave his opinion that it would be in the children’s best interests to remain in Blackfoot. This conclusion was not a result of bias by Mr. Garner, but was instead based on his interactions with the children in Blackfoot, as well as his knowledge of Idaho custodial standards. (*Id.*; *id.* at p. 93, L. 25 – p. 94, L. 21.) Contrary to Chelsea’s assertions, this was not “guesswork” on Mr. Garner’s part – while Mr. Garner acknowledged one would have to guess at the precise amount of damage caused by uprooting the children to Havre, Mr. Garner unequivocally acknowledged damage would occur to the children’s social structure. (*Id.* at p. 100, L. 2-19.) Based on his observations of the children in Blackfoot, as well as his professional understanding of child custody issues, Mr. Garner concluded it was in the children’s best interests to remain in Blackfoot.

2. The magistrate court erred in not striking Ms. Savage’s testimony.

As addressed extensively in Zane’s initial brief, the magistrate court erred in denying Zane’s counsel’s motion to strike Ms. Savage’s testimony. (*See* Appellant Br. 14-21.) Because Ms. Savage acknowledged her unfamiliarity with both Idaho custodial standards and the

children's Blackfoot environment (Tr Vol. I, p. 188, L. 25 – p. 189, L. 5; *id.* at p. 189, L. 6-21), Ms. Savage was not qualified to testify regarding the custody of the children. (Appellant Br. 21-26.)

Chelsea mistakenly argues that Ms. Savage's interactions with the children in her Havre office, as well as her subsequent meeting with Chelsea and Daniel Sorensen, rendered her a competent witness as to the children's custodial status. (Respondent Br. 30.) This argument illustrates a flaw found frequently throughout Chelsea's respondent brief: that of focusing on the children's residence in Havre, rather than their residence in Blackfoot.

As pointed out in Zane's initial brief, and as further addressed below, *infra*, such an approach incorrectly shifts the analysis from Blackfoot, the children's home, to Havre, the location wherein Chelsea sought to relocate the children. Instead, the focus before the magistrate court was whether the children's best interests called for them to remain in Blackfoot, not Havre, and as such Ms. Savage's testimony regarding her office visit with the children in Montana, exclusive of any observation in Blackfoot, was irrelevant to determining custody of the children.

3. The magistrate court failed to make findings of fact on material issues related to the expert witness testimony.

Rule 801 of the family law procedural rules requires in part that “the court *shall find the facts specially* and state separately its conclusions of law thereon and direct the entry of the appropriate judgment...” IDAHO R. FAMILY LAW P. 801 (2016) (emphasis added). This language from Rule 801 mirrors language found in Rule 52(a)(1) of the civil procedural rules. *See* IDAHO R. CIV. P. 52(a)(1) (2016).

The Idaho Court of Appeals, in interpreting the requirements articulated in Rule 801 of the family law procedural rules, noted the importance of a court issuing specific findings of fact in a family law case:

Our holding is not intended merely to facilitate appellate review, although that is a worthy consideration. Specific findings also demonstrate to the parties that the trial court has examined their divorce case – one of the most important emotional and economic events in their lives – with due care and attention to the evidence. Most importantly, the requirement of explicit findings encourages a trial judge to rely upon objectively supportable grounds for his decision, and discourages subjective or attitude-influenced perceptions of the case. Without that objective basis, trial court fact-finding is, as Judge Jerome Frank once observed, a “soft spot in the administration of justice.”

Donndelinger v. Donndelinger, 107 Idaho 431, 437, 690 P.2d 366, 371 (Ct.App. 1984) (citing J. Frank, COURTS ON TRIAL 74 (1950)). Appellate courts may only disregard a trial court’s failure to issue findings of fact on material issues affecting the judgment if the “record is clear and yields an obvious answer to the relevant factual question.” *Donndelinger*, 107 Idaho at 437, 690 P.2d at 271 (citing *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982)). Otherwise, the trial court’s “failure to issue findings of fact on material issues affecting the judgment requires the judgment be set aside and the case remanded.” *Id.*

The magistrate court failed to issue findings of fact that complied with the requirements of Rule 801. Specifically, the magistrate court failed to distinguish or even address the expert testimony, including why it considered such testimony to be inconclusive in determining the best interests of the children. The magistrate court also failed to address the detrimental effects the children would experience through traveling from Havre to Blackfoot for visitation with Zane, as well as the negative impact on the children from Chelsea’s planned return to Blackfoot in 2-3

years. As noted above and in Zane’s initial briefing, these are material issues impacting custody of the children, and as such should have been addressed in the magistrate court’s findings of fact under Rule 801.

Further, this failure by the magistrate court to issue findings of fact addressing these material issues cannot be disregarded by this Court. The record does not yield an “obvious answer” to the factual question vis-à-vis custody of the children. *See Sherry v. Sherry*, 108 Idaho 645, 649, 701 P.2d 265, 269 (Ct.App. 1985). The record does not clearly indicate that living in Havre is in the children’s best interests; instead, evidence at trial, including that addressing the detrimental impact on the children from requiring them to travel from Havre to Blackfoot, as well as subjecting them to another move in 2-3 years’ time, supported a determination that the children should remain in Blackfoot. Because the court failed to issue findings of fact addressing these material issues, and because the record does not yield an obvious answer to the factual question, this Court must vacate the magistrate court’s decision to allow Chelsea to relocate with the children to Havre. *See id.*

B. The magistrate court improperly permitted Ms. Savage to testify via Skype in contravention of the Idaho family law procedural rules and evidentiary rules.

Chelsea mistakenly argues in her respondent brief that the magistrate court properly allowed Ms. Savage to testify via Skype under the “relaxed evidentiary standards and intent of the Idaho Rules of Family Law Procedure.” (Respondent Br. 26-27.) This argument, however, ignores the clear limitations of the family law procedural rules.

1. The Idaho family law procedural rules and evidentiary rules require witnesses to testify orally in open court.

Contrary to Chelsea's argument, Rule 712 of the family law procedural rules contains identical language to that found in Rule 43 of the civil procedure rules¹, limiting testimony to that provided orally in open court:

In all trials the testimony of witnesses *shall* be taken orally in open court, unless otherwise provided by statute, by these rules, the Idaho Rules of Evidence, or other rules adopted by the Supreme Court of Idaho.

IDAHO R. FAMILY LAW P. 712(A) (2016) (emphasis added). Notably, Rule 712 does not include any provisions allowing a court, for good cause in compelling circumstances and with appropriate safeguards, to permit testimony in open court by contemporaneous transmission. *Id.*

Chelsea argues that because neither party moved for strict compliance with the Idaho Rules of Evidence pursuant to Rule 102 of the family law procedural rules, testimony via Skype was appropriate under the relaxed standard of Rule 102. This, however, is an overbroad interpretation of Rule 102 that ignores the clear language of Rule 712.

If no party moves for strict compliance with the rules of evidence, Rule 102 of the family law procedural rules provides

...[A]ll relevant evidence is admissible, provided, however, that the court shall exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose same.

¹ As noted in Zane's initial briefing, the language of Rule 34 of the Idaho Rules of Civil Procedure cited herein was effective until July 1, 2016.

IDAHO R. FAMILY LAW P. 102.B.2 (2016). This language speaks only to the admission of relevant testimony, and does not speak to the requirement that witnesses testify orally in open court. Though the family law procedural rules do call for a liberal construction by courts under Rule 101, the interpretation called for by Chelsea in permitting Skype testimony despite the clear language to the contrary in Rule 712(A) extends beyond the liberal construction permitted under Rule 101. *See generally* IDAHO R. FAMILY LAW P. 101 (2016). Instead, in arguing that Rule 102 permits testimony via Skype, despite the clear language to the contrary contained in Rule 712, Chelsea asks for an interpretation of the family law procedural rules that would effectively render Rule 712(A) meaningless. Chelsea's approach goes far beyond the liberal construction permitted by the family law procedural rules, and instead completely disregards the clear language of Rule 712(A).

The position advanced by Chelsea in her brief also ignores the problems inherent with permitting testimony via Skype or other videoconferencing or teleconferencing media. As noted in Zane's initial briefing, other jurisdictions interpreting identical language from their respective court rules requiring witnesses to testify orally in open court have noted the problems inherent with testimony via videoconferencing, including the inability to judge the demeanor of a witness face-to-face and the loss of personal impression, not to mention potential technological difficulties. (*See* Appellant Br. 17-19.)

Further, because of the problems inherent with videoconferencing or Skype testimony, such testimony is not justified under the relaxed evidentiary standard of Rule 102 of the family law procedural rules, as such testimony can threaten the integrity of the proceeding, creating a

danger of unfair prejudice that outweighs any probative value of the testimony. These shortcomings of Ms. Savage's testifying via Skype were seen during her testimony, including the video going black (Tr Vol. I, p. 182, L. 15 – p. 183, L. 22); video delay (*id.* at p. 153 L. 8-11); and unintelligible testimony (*id.* at p. 141, L. 1 – p. 174, L. 12; p. 182, L. 1 – p. 206, L. 19). Contrary to Chelsea's claims, these problems inherent in Ms. Savage's testimony via Skype were not attributable or "unreasonably amplified by the overt, unreasonable impatience of Zane's counsel." (Respondent Br. 28.) Instead, these problems reflect the reasoning and rationale for Rule 712(A) requiring oral testimony in open court.

As noted by Zane in his initial brief, there were no compelling or extenuating circumstances justifying Ms. Savage's testimony via Skype. Chelsea argues that allowing Ms. Savage to testify via Skype was "an inexpensive way for Chelsea's expert witness to appear in open court during the trial proceedings." (Respondent Br. 28.) However, expense alone is not a compelling reason to permit testimony via Skype under the mandatory language of Rule 712(A). Chelsea decided to retain an expert witness situated in Montana rather than one closer to Blackfoot, and Chelsea should have been made to bear the burden of the extra expense in having her retained expert appear in person to testify in open court. Instead, the magistrate court abused its discretion in permitting Ms. Savage to testify via Skype, contrary to the express language of Rule 712.

C. The magistrate court abused its discretion in determining it was in the children's best interest to relocate to Havre, Montana.

In his initial brief, Zane addressed the application of testimony and evidence in the record

to the elements listed in Idaho Code § 32-717, which Zane incorporates by reference. Zane further responds to specific arguments contained in Chelsea's respondent brief, including Chelsea's improper framing of Idaho custodial standards and Chelsea's misrepresentation of the record, as set forth below.

1. Chelsea failed to meet her burden as the relocating parent to show relocation to Havre was in the childrens' best interests.

In her respondent brief, Chelsea attempts to downplay her burden as a relocating parent by arguing that because the custody order does not specifically prohibit her from moving from Blackfoot, she is free to relocate with the children. (Respondent Br. 20-21.) This is a disingenuous argument designed to shift Chelsea's burden to Zane: rather than Chelsea having to establish that relocation is in the children's best interests, she essentially wants Zane to prove why she cannot relocate with the children. This approach ignores the clear standard in Idaho that places the burden on the relocating parent to establish that relocation is in the best interests of the children, given Idaho's presumption for frequent and continuing contact with both parents. *Clair v. Clair*, 153 Idaho 278, 284, 281 P.3d 115, 121 (2012); IDAHO CODE § 32-717B (2016).

Because Chelsea decided unilaterally to move out of state with the children, it was her burden to prove by a preponderance of the evidence that the move was in the children's best interests. *Clair*, 153 Idaho at 285, 281 P.3d at 122 (citing *Danti v. Danti*, 146 Idaho 929, 935, 205 P.3d 1140, 1146 (2009)). Chelsea's burden as the relocating parent exists regardless of the language (or lack thereof) addressing relocation in the parties' divorce decree. For the reasons set forth in Zane's initial brief, Chelsea failed to meet her burden to prove relocation was in the

children's best interests, and the magistrate court abused its discretion in allowing Chelsea to relocate with the children to Havre.

2. Chelsea improperly focuses her analysis on the children's environment in Havre, rather than Blackfoot.

Throughout her respondent brief, Chelsea improperly focuses on evaluation of the children's environment in Havre as determinative of whether the children should have been relocated from Blackfoot. While a child's adjustment to his or her home, school, and community is a factor a magistrate court may consider pursuant to Idaho Code § 32-717, such consideration in this case would be on the children's adjustment to their home, school, and community in *Blackfoot*, not Havre. Blackfoot is the community in which the children resided prior to the magistrate court's temporary order allowing Chelsea to take the children to Havre, and Blackfoot is the community to where Chelsea plans to return with the children in 2-3 years' time.

Further, to focus analysis of the children's adjustment to Havre would be to give improper weight to the magistrate court's temporary order allowing the move to Havre. The temporary order was just that – temporary. At trial, Ms. Griggs testified that the children's limited time in Havre in the intervening months since the temporary orders hearing could be likened to a "vacation," as the children were still transitioning to Havre. (Tr Vol. I, p. 68, L. 9-24.) To focus on the children's adjustment to Havre in the intervening months between the magistrate court issuing the temporary order and the trial in this matter, instead of the children's adjustment to their environment in Blackfoot prior to the temporary orders hearing, calls for a conclusion that the temporary orders hearing was an essential trial on the merits, effectively

eviscerating the need to have a full trial. Instead of this overblown approach to the magistrate court's temporary order, the proper analysis should be on the children's environment in Blackfoot, not Havre.

3. Chelsea's argument ignores her ability to reside in Blackfoot.

Throughout her respondent brief, Chelsea characterizes the possibly custody arrangements for the children as having the children remain in Blackfoot with Zane versus having the children relocate to Havre with Chelsea. In doing so, Chelsea repeatedly ignores the possibility that she could reside in Blackfoot with the children. As noted in Zane's initial briefing, and as testified to during trial, Chelsea can live in her parents' home in Blackfoot. (Appellant Br. 41; Tr Vol. I, p. 313, L. 10-23.) The increase in income that will allow the children to participate in additional extracurricular activities in Havre will also be available should Chelsea reside with the children in Blackfoot, as her husband may continue in his physician's assistant job in Havre.

While Chelsea undoubtedly would prefer to relocate to Havre with the children, the foundational hallmark in child custody cases is the best interests of the children, not the parents – a principle well-recognized in Idaho jurisprudence. *Clair v. Clair*, 153 Idaho 278, 286, 281 P.3d 115, 123 (2012). The evidence in the record indicates Chelsea could reside with the children in Blackfoot, and therefore promote continuity and stability in the children's lives both now and upon Daniel Sorensen's planned return to Rexburg. The magistrate court abused its discretion in considering Chelsea's desire to move to Havre ahead of the children's best interests in remaining in Blackfoot.

4. Chelsea asks this Court to adopt a custodial standard that would punish single parents while rewarding married parents.

Chelsea also asks this Court to essentially adopt a custody standard that would punish single parents while rewarding married parents. Throughout her brief, Chelsea focuses on the difference between her status as a stay-at-home mother versus Zane's status as an employed father. (Respondent Br. 18-19, 31.) Chelsea references this distinction in an attempt to counter Zane's argument that the magistrate court abused its discretion in improperly invoking the tender years doctrine. (*See* Appellant Br. 42-44; *see also* Respondent Br. 31.) Chelsea goes so far as to state, "Had Zane been able to be a full-time stay at home father, the magistrate court would have considered it and weighted the factor in his favor." (Respondent Br. 31.)

Chelsea is incorrect in arguing that the magistrate court could appropriately consider Zane's employment status as a factor weighing against Zane having custody of the children, particularly in light of Zane's mother's testimony at the temporary orders hearing that she and Zane's father would continue to help with the children, as necessary. (R Vol. I, p. 141, Hr'g Tr 182:4-25.) The evidence in the record clearly spoke to Karen Reed's continuing ability to help watch the children, something she has been doing at both Zane's and Chelsea's request during the course of the children's lives. Chelsea further misrepresents Zane's testimony, arguing that his employment situation is not stable as it requires him to travel to Boise and other locations. (Respondent Br. 18-19.) However, as noted in Zane's initial brief, both Zane and his employer testified that Zane would be able to manage any demands of his job while being available in Blackfoot to parent the children, with his parents able to step in during any work occasion

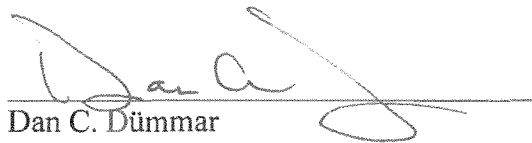
requiring him to travel. (R Vol. I, p. 113, Hr'g Tr 71:5-23; *id.* at p. 104, Hr'g Tr 33:10-35:9.)

As stated by the Kansas Court of Appeals, and as referenced by the Idaho Supreme Court, ““This Court has never held that a divorced father, who is otherwise entitled to custody of his child, should be deprived thereof simply because the necessities of making a living compel him to temporarily entrust care of the child to grandparents.”” *Shumway v. Shumway*, 106 Idaho 415, 419, 679 P.2d 1133, 1137 (1984) (quoting *Neis v. Neis*, 599 P.2d 305, 309 (Kan.Ct.App. 1984)). Zane’s employment status did not provide the magistrate court justification to employ the tender years doctrine or otherwise inflate Chelsea’s position as a stay at home mother, and to do such was an abuse of discretion by the magistrate court.

II. CONCLUSION AND RELIEF REQUESTED

As a result of the foregoing, the magistrate court should be reversed and an order be entered ordering Chelsea to immediately return to Blackfoot with the children, or, in the alternative, transferring primary physical custody of the children to Zane.

DATED: July 25, 2016.

A handwritten signature in black ink, appearing to read "Dan C. Dümmer", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of July, 2016, I caused to be served two true and correct copies of the foregoing document to the following parties via the method of delivery designated:

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